No. 644

In the Supreme Court of the United States

OCTOBER TERM, 1957

SOOREN ALEXANDER SKENDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
RUFUS D. McLEAN,
Acting Assistant Attorney General,
BEATRICE ROSENBERG,
WILLIAM J. SCHAFER III,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	3
Argument	5
Conclusion	9

CITATIONS

Cases:

Ceballos v. *Shaughnessy*, 352 U. S. 599 ..... 5, 6

Cuozzo, In re Naturalization of, 235 F. 2d 184 7

Mirzoeff's Petition, In re, 143 F. Supp. 177 5

Pons v. *United States*, 220 F. 2d 399, certiorari denied, 350 U. S. 830 5

Rosio v. *Shaughnessy*, 134 F. Supp. 217 7

Statutes:

Immigration and Nationality Act of 1952, 66 Stat. 163, *et seq.*:

Sec. 101 (a) (8 U. S. C. 1101 (a)) 5

Sec. 315 (a) (8 U. S. C. 1426 (a)) 2, 5, 7, 8

Sec. 315 (b) (8 U. S. C. 1426 (b)) 2

Sec. 405 (b) 5

Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 55 Stat. 844 (50 U. S. C. App., 1946 ed., 303 (a)), Sec. 3 (a) 3, 5, 7

Selective Service Regulations, Sec. 622.43 6

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 644

SOOREN ALEXANDER SKENDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 248 F. 2d 92 (C. A. 2).

JURISDICTION

The judgment of the Court of Appeals was entered on September 6, 1957. The petition for a writ of certiorari was filed on December 5, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether an alien who knowingly applied for relief from military service on the ground that he was a neutral alien, and was in fact relieved from military

training on that ground for seven months, is debarred from citizenship under Section 315 (a) of the Immigration and Nationality Act of 1952, even though his country had ceased to be neutral nine days before his classification.

2. Whether the government attorney wrongfully and prejudicially withheld from evidence a letter written by the Selective Service System to the Immigration and Naturalization Service stating that petitioner's exemption became null and void on June 3, 1943.

STATUTES INVOLVED

Section 315 of the Immigration and Nationality Act of 1952, 66 Stat. 242 (8 U. S. C. 1426) provides:

> Sec. 315 (a) Notwithstanding the provisions of section 405 (b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.
>
> (b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien.

Section 3 (a) of Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 55 Stat. 845 (50 U. S. C. App., 1946 ed., 303 (a)), provided:

Sec. 3. (a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of twenty and forty-five at the time fixed for his registration, or who attains the age of twenty after having been required to register pursuant to section 2 of this Act, shall be liable for training and service in the land or naval forces of the United States: *Provided*, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: * * *.

STATEMENT

Petitioner, a native and national of Iraq, entered the United States for permanent residence on October 3, 1941, intending to attend school here (R. 8a–9a). As a male alien residing in the United States, he was subject to registration and military service under the Selective Training and Service Act of 1940, as amended (50 U. S. C. App., 1946 ed., 301, *et seq.*).

While Iraq was still a neutral country, petitioner, on October 31, 1942, filed with his local draft board D. S. S. Form 301, "Application by Alien for Relief from Military Service" (R. 3a). In this application,

subscribed and sworn to before a notary public, petitioner declared (Gov't. Exhibit No. 3):

> I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, as amended, in accordance with the Act of Congress, approved December 20, 1941. I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States * * *.

In accordance with this request, petitioner was classified IV–C on January 25, 1943 (R. 3a).

Nine days before petitioner was classified IV–C, Iraq declared war on the Axis forces. It was not until June 3, 1943, however, that Selective Service Regulations took cognizance of this fact (R. 4a). And it was not until August 31, 1943, seven months after he was classified IV–C, that petitioner was reclassified I–A, making him subject to immediate induction (R. 4a).

Petitioner appealed from the reclassification stating that his exemption from military duty (D. S. S. Form 301) was valid and could not be declared invalid except by Congress (R. 4a). The appeal was denied and petitioner remained in Class I–A (R. 14a). He was then given a pre-induction physical examination, as a result of which it was determined that, for physical reasons, he should be reclassified IV–F and deferred from military service (R. 4a).

On June 24, 1947, petitioner filed a petition for naturalization (R. 2a). At a final hearing on this

petition in the United States District Court for the Southern District of New York, the district judge, having heard petitioner testify, concluded that petitioner acted knowingly when he requested and filed Form 301 (R. 20a). The petition for naturalization was denied (R. 21a). Petitioner then appealed to the United States Court of Appeals for the Second Circuit (R. 22a), and that court affirmed the decision of the district court.

ARGUMENT

1. The question raised in petitioner's first point as to whether Section 315 (a) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1426) or Section 3 (a) of the Selective Service Training Act of 1940 (50 U. S. C. App., 1946 ed., 303 (a)) governs applications for naturalization under the 1952 Act is not involved in this case.[1] The government presented its case in the district court on the theory that the governing statute was Section 315 (a) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1426), which denies naturalization to an alien who had both

[1] The question arises from an apparent inconsistency in the Immigration and Nationality Act of 1952. Sections 315 (a) and 405 (b) appear to have made the conditions of Section 315 (a) controlling in naturalization. Section 101 (a) (19), however, defines as "ineligible to citizenship" any alien who is or was at any time permanently debarred under any section of the 1952 Act "or any other Act." Under the 1940 Act, a mere application for exemption as a neutral alien was a bar to citizenship. *Ceballos* v. *Shaughnessy*, 352 U. S. 599. Courts have taken the position that the requirements of Section 315 and not those of Section 3 (a) of the Selective Service Training Act of 1940 apply in a case like the instant one: *Pons* v. *United States*, 220 F. 2d 399 (C. A. 1), certiorari denied, 350 U. S. 830; *In re Mirzoeff's Petition*, 143 F. Supp. 177 (S. D. N. Y.).

applied for exemption from military service on the ground of alienage and been relieved from military duty on that ground. Had Section 3 (a) been deemed applicable, petitioner could only have been disadvantaged, for, under that section, the mere filing of an application by one who was, at the time of such filing, a neutral operates as a bar. *Ceballos* v. *Shaughnessy*, 352 U. S. 599.

Accepting Section 315 (a) as controlling, the lower courts found: (1) that petitioner knowingly asked for exemption from military duty on the ground that he was an alien; and (2) that petitioner was granted relief from such service for a period of 7 months (from January 25, 1943 to August 31, 1943) because of his alienage.

2. Petitioner contends (Pet. 7-9) that he was not exempted from training or service in the armed forces upon the ground that he was an alien, as required by Section 315 (a) of the Immigration and Nationality Act of 1952, but that he was relieved from service because of a physical defect. The record clearly refutes this contention.

The fact that petitioner knowingly filed and signed Form 301 requesting relief from service is not open to contest. In response to petitioner's request, the local draft board, on January 25, 1943, classified him IV-C, the classification for an alien who "at any time prior to (A) his induction * * * files with his local board an application by Alien for Relief from Military Service (Form 301) * * *", Selective Service Regulations § 622.43. From that date until August 31, 1943, a period of 7 months covering a very critical

stage of the war, petitioner was relieved from serving in the armed forces because of alienage. The fact that he was later deferred for physical reasons (after being reclassified I–A) is immaterial because, no matter what happened after August 31, 1943, for 7 months before that date petitioner "was relieved * * * from * * * service * * *" because of alienage within the purview of Section 315 of the Immigration and Nationality Act of 1952 (8 U. S. C. 1426). *In re Naturalization of Cuozzo,* 235 F. 2d 184 (C. A. 3).

The fact that Iraq became a co-belligerent 9 days before the initial order classifying petitioner IV–C was entered does not render it void. Even assuming that the order was erroneous, it did, until corrected, afford petitioner relief from service in the armed forces.[2]

In *Rosio* v. *Shaughnessy,* 134 F. Supp. 217 (S. D. N. Y.), an alien who was not actually eligible for exemption on the ground of alienage filed Form 301 and was granted an alien's exemption. The court, rejecting the plea that his exemption was void *ab initio,* stated:

> It is true that relator * * * had no statutory right * * * to apply for exemption * * * on the ground of his alienage. However, relator did apply and was granted such exemption with full knowledge of the consequences * * *.

[2] Local draft boards are required to classify registrants in accordance with "Rules and Regulations prescribed by the President"; see Section 3 of the Selective Training and Service Act of 1940. Although Iraq became a co-belligerent on January 15, 1943, this fact was not noted in the Regulations until June 3, 1943. Thus it appears that the board properly proceeded in accordance with the regulations outstanding in January, 1943.

> Having applied for and received exemption, relator clearly comes within the provisions of section 315 of the Immigration and Nationality Act of 1952 * * *.

Under Section 315 (a), it is the fact of relief and not the legal right to it that is controlling. Since petitioner did apply for and was relieved from service, he comes within the sanction of Section 315 (a) and is ineligible to become a citizen of the United States.

3. Petitioner makes the statement that the government is required to present all evidence to the court, but does not explain to what omitted evidence he refers. In the government's brief in the court below, a similar charge was understood to refer to a letter from the Selective Service System in response to a letter from the Immigration and Naturalization Service requesting information as to whether Iraq was a neutral country in October, 1942, when petitioner claimed exemption. The text of the letter was set forth in full in the brief below as follows:

> Mr. Edward J. Shaughnessy
> District Director, New York District
> Immigration and Naturalization Service
> 70 Columbus Avenue
> New York 23, New York
>
> Subject: Sooren Alexander Skender
> LB 221, Order No. S-2777B
> (20-9)
>
> Dear Sir:
>
> Your letter of 18 April 1952 is acknowledged.
>
> For your information, Selective Service System Local Board release 112 dated September 29, 1942, lists Iraq as a neutral national. Local Board Memorandum No. 112 was amended, the

effective date of such amendment being 3 June 1943 whereby Iraq is listed as a co-belligerent nation. Subject registrant on October 31, 1942, was entitled to sign D. S. S. Form 301.

This form was in accordance with Selective Service Regulations until 3 June 1943, at which time the same became null and void.

For the State Director
F. L. Shannon
Lt. Colonel, USMC
Manpower Division

Why petitioner considers that this letter was evidence favorable to him is difficult to understand. The letter supports the view that, until the Selective Service System took notice of Iraq's co-belligerency in June, 1943, petitioner was legally entitled to the exemption which he in fact claimed and received.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. Lee Rankin,
Solicitor General.

Rufus D. McLean,
Acting Assistant Attorney General.

Beatrice Rosenberg,
William J. Schafer III,
Attorneys.

January 1958.